Supreme Court, U.S.
FILED
JUL 1 1991
OFFICE OF THE CLERK

(2)

No. 90-1564

In The

Supreme Court of the United States

October Term, 1990

TERRITORIAL COURT OF THE VIRGIN ISLANDS,

Petitioner,

v.

ESTATE THOMAS MALL, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN H. BENHAM
WATTS & STREIBICH
14A Norre Gade
P.O. Box 11720
St. Thomas, U.S. Virgin Islands
00801
Tel: (809) 774-0673
Fax: (809) 776-3630
Counsel for Respondent

Of counsel:
CARL J. HARTMANN
201 East 28th Street
Suite 15-B
New York, N.Y. 10016
Tel: (212) 725-6327

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Whether the Court should issue a writ of certiorari to review an issue which presents no important federal question and on which the Petitioner failed to develop a record in the lower courts?

Whether the Court should issue a writ of certiorari to review a decision wherein the Petitioner attained complete relief from the United States Third Circuit Court of Appeals?

PARTIES TO THE PROCEEDING

Respondent Estate Thomas Mall, Inc. is a United States Virgin Islands corporation. Respondent owns a shopping plaza known as Vitraco Park in Charlotte Amalie, St. Thomas, United States Virgin Islands and rents commercial space at that location. One of the tenants was the Petitioner Territorial Court of the Virgin Islands pursuant to a lease entered into with the prior owner of Vitraco Park.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. THIS ACTION DOES NOT PRESENT ANY IMPORTANT ISSUE REQUIRING RESOLUTION BY THIS COURT 8

A. The decision of the Third Circuit is not in conflict with any decision of another United States court of appeals, nor does it conflict with a state or territorial court of last resort 11

B. There is no important question of federal law which should be settled by this court 12

C. This Court should not grant review to a prevailing party 13

II. THE THIRD CIRCUIT CORRECTLY HELD THAT ACTION BY THE VIRGIN ISLANDS LEGISLATURE IS REQUIRED TO DIVEST THE DISTRICT COURT OF THE VIRGIN ISLANDS OF CONCURRENT JURISDICTION OVER LOCAL CAUSES OF ACTION 14

CONCLUSION 17

TABLE OF CONTENTS – Continued

Page

APPENDICES

1. *Government of the Virgin Islands v. Bryan*, Criminal No. 1989-129, Dist. Ct. of the Virgin Islands, Div. of St. Croix, Memorandum Opinion January 29, 1990..... App. 1

2. Letter, June 13, 1991 – Leon A. Kendall to John H. Benham.....App. 12

TABLE OF AUTHORITIES

Page

CASES:

Agana Bay Develop, Co. (Hong Kong) Ltd. v. Supreme Court of Guam, 529 F.2d 952 (9th Cir. 1976) 12

Government of the Virgin Islands v. Bryan, Criminal No. 1989-129 (D.V.I., Div. of St. Croix, January 29, 1990) 10, 11, 12

Public Service Commission v. Brashear Freight Lines, Inc., 306 U.S. 204 (1938) 14

STATUTES:

United States Code & Statutes at Large

Ch. 699, § 25, 49 Stat. 1813 (1936) 15

Ch. 558, § 22, 68 Stat. 506 (1954) 15

Ch. 558, § 23, 68 Stat. 506 (1954) 15

48 U.S.C. § 1612(b) 16

Virgin Islands Code & Session Laws

Title 28, §§ 781 et seq. 6

1976 V.I. Sess. Laws No. 3876 ..... 15, 16

1981 V.I. Sess. Laws No. 4647 ..... 10, 16

1990 V.I. Sess. Laws No. 5594 13

Legislative Materials

130 Cong. Rec. S. 10527 (August 10, 1984) 17

CITATIONS OF OPINIONS AND JUDGMENTS BELOW

Estate Thomas Mall, Inc. v. Territorial Court of the Virgin Islands, 923 F.2d 258 (3d Cir. 1991), *reh'g denied* ___ F.2d ___ (1991).

Estate Thomas Mall, Inc. v. Territorial Court of the Virgin Islands, Civil No. 1990-145, District Court of the Virgin Islands, Division of St. Thomas & St. John, Order entered August 31, 1990, Memorandum Opinion issued September 5, 1990.

JURISDICTIONAL STATEMENT

The Territorial Court of the Virgin Islands (hereinafter "Territorial Court" or "Petitioner") asserts that this Court should exercise its discretionary jurisdiction to issue a writ of certiorari to the Third Circuit Court of Appeals. 28 U.S.C. § 1254 (1). Estate Thomas Mall, Inc. (hereinafter "Estate Thomas Mall" or "Respondent") opposes the grant of a writ of certiorari upon the grounds stated in the argument portion of this brief in opposition.

STATUTES INVOLVED

48 U.S.C. § 1611:

(a) District Court of the Virgin Islands; local courts

The judicial power of the Virgin Islands shall be vested in a court of record designated the "District Court of the Virgin Islands" established by Congress, and in such appellate court and lower local courts as may have been or may hereafter be established by local law.

(b) Jurisdiction

The legislature of the Virgin Islands may vest in the courts of the Virgin Islands established by local law jurisdiction over all causes in the Virgin Islands over which any court established by the Constitution and laws of the United States does not have exclusive jurisdiction. Such jurisdiction shall be subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by section 1612 (a) and (c) of this title.

48 U.S.C. § 1612:

(a) Jurisdiction

The District Court of the Virgin Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of Title 28, and that of a bankruptcy court of the United States. The District Court of the Virgin Islands shall have exclusive jurisdiction over all criminal and civil proceedings in the Virgin Islands with respect to the income tax laws applicable to the Virgin Islands, regardless of the degree of the offense or of the amount involved, except the ancillary laws relating to the income tax enacted by the legislature of the Virgin Islands. Any act or failure to act with respect to the income tax laws applicable to the Virgin Islands which could constitute a criminal offense described in chapter 75 of subtitle F of Title 26 shall constitute an offense against the government of the Virgin Islands and may be prosecuted by the appropriate officers thereof in the District Court of the Virgin Islands without the request or the consent of the United States attorney for the Virgin

Islands, notwithstanding the provisions of 1617 of this title.

(b) General jurisdiction; limitations

In addition to the jurisdiction described in subsection (a) of this section the District Court of the Virgin Islands shall have general original jurisdiction in all causes in the Virgin Islands the jurisdiction over which is not then vested by local law in the local courts of the Virgin Islands: *Provided,* That the jurisdiction of the District Court of the Virgin Islands under this subsection shall not extend to civil actions wherein the matter in controversy does not exceed the sum or value of $500, exclusive of interest and costs; to criminal cases wherein the maximum punishment which may be imposed does not exceed a fine of $100 or imprisonment for six months, or both; and to violations of local police and executive regulations. The courts established by local law shall have jurisdiction over the civil actions, criminal cases, and violations set forth in the preceding proviso. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court established by local law for the purposes of determining the availability of indictment by grand jury or trial by jury.

4 V.I.C. § 32: Original jurisdiction

(a) Under section 22 of the Revised Organic Act, approved July 22, 1954, the district court has the original jurisdiction of a district court of the United States in all causes arising under the Constitution, treaties and laws of the United States, regardless of the sum or value of the

matter in controversy, and has general original jurisdiction in all other causes in the Virgin Islands, where exclusive jurisdiction is not conferred upon the territorial court, as the inferior court of the Territory, by section 23 of the Revised Organic Act. When it is in the interest of justice to do so the district court may on motion of any party transfer to the district court any action or proceeding brought in the territorial court, and the district court shall have jurisdiction to hear and determine such action or proceeding.

4 V.I.C. § 75: Exclusive jurisdiction

The territorial court shall have original, exclusive jurisdiction –

(1) of all civil actions wherein the matter in controversy does not exceed the sum or value of $500, exclusive of interest and costs;

(2) of all criminal cases wherein the maximum punishment that may be imposed does not exceed a fine of $100 or imprisonment of six (6) months, or both;

(3) of all violations of police and executive regulations, unless otherwise provided by law; and

(4) where otherwise provided by law.

4 V.I.C. § 76: Concurrent jurisdiction

(a) The territorial court shall have original jurisdiction concurrent with that of the district court in all civil actions wherein the matter in controversy exceeds the sum of $500 but does not exceed the sum of $200,000; to supervise and administer estates and fiduciary relations; to appoint and supervise guardians and trustees; to hear

and determine juvenile, divorce, annulment and separation proceedings; to grant adoptions and changes of name; to establish paternity; to legitimize children and to make orders and decrees pertaining to the support of relations.

28 V.I.C. § 782: Action for forcible entry and detainer

(a) When a forcible entry is made upon any premises, or when an entry is made in a peaceable manner and the possession is held by force, the person entitled to the premises may maintain an action to recover the possession thereof.

(b) If the unpaid rent or the value of the real property involved does not exceed $500, exclusive of interest and costs, the municipal court shall have exclusive jurisdiction of such action. In all other cases, the municipal court and the district court shall have concurrent jurisdiction.

1976 V.I. Sess. Laws No. 3876

§ 5: Wherever the name "Municipal Court" or "Municipal Court of the Virgin Islands" appears in the Virgin Islands Code or other statutes of the Virgin Islands in other than a historical sense, the same is hereby amended to read "Territorial Court" or "Territorial Court of the Virgin Islands", as the case may be.

1990 V.I. Sess. Laws No. 5594:

Subject to the original jurisdiction conferred on the District Court by Section 22 of the Revised Organic Act of 1954, as amended, effective October 1, 1991, the Territorial Court shall have original jurisdiction in all civil actions regardless of the amount in controversy.

STATEMENT OF THE CASE[1]

This petition for writ of certiorari presents the curious scenario of the judicial branch of the Virgin Islands government attempting to obtain through litigation what a co-equal branch of the Virgin Islands government, the legislature, has refused to grant by legislation, i.e. exclusive jurisdiction of local causes of action.

This cause began as an action to evict the Territorial Court from the premises it leases from Estate Thomas Mall. The action was filed pursuant to the Virgin Islands forcible entry and detainer statutes. 28 V.I.C. §§ 781 *et seq.* The sole substantive issue in the action was whether Petitioner or Respondent was entitled to possession of the leased premises. The district court denied the relief requested by Estate Thomas Mall on the condition that the Territorial Court pay the back rent by September 14, 1990. Pet. App. at 24a. The Territorial Court appealed this decision to the United States Third Circuit Court of Appeals.

---

[1] The orders and opinions of the District Court of the Virgin Islands and the United States Court of Appeals for the Third Circuit are reproduced in the Appendix to the Territorial Court's Petition for Writ of Certiorari. In accord with this Court's rule that a brief in opposition "be as short as possible" appendix references to those materials will be made to the Appendix contained in the Territorial Court's Petition for Writ of Certiorari. Sup. Ct. R. 15.3. Citations to the petitioner's appendix are noted as Pet. App. at ___. Materials other than those contained in the Territorial Court's appendix are contained in an appendix to this brief in opposition. These materials will be cited as App. at ___.

The Third Circuit reversed the district court and remanded the action to the district court *with instructions to dismiss the complaint*. Pet. App. at 16a. The basis of the Third Circuit's decision was that the issues presented by the dispute were beyond the scope of the issues which could be litigated within the confines of a summary forcible entry and detainer action. Pet. App. at 14a-16a. The Third Circuit thoroughly examined the jurisdictional issue urged in the Territorial Court's petition to this court and rejected the argument of the Territorial Court. The Third Circuit also rejected the Territorial Court's petition for rehearing as to this issue.

SUMMARY OF ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioner in this action is the party which prevailed before the Third Circuit. However, the Territorial Court is not satisfied with the grounds of the Third Circuit's opinion. Instead, the Territorial Court seeks to waste the resources and time of this Court to obtain a purely advisory opinion which will have no effect on this action. This action presents none of the usual grounds which would justify this Court exercising its discretion to hear the merits of this action. There is no conflict between the circuits on this question – as the only other circuit opinion which has addressed a similar issue was expressly relied upon by the Third Circuit in its opinion. Neither is the question of any great public concern: As of October 1, 1991 the Territorial Court will assume general original jurisdiction of civil actions in the United States

Virgin Islands, pursuant to legislation passed by the Virgin Islands legislature. The statutes whose interpretation the Territorial Court disputes will be soon reduced to the status of an historical footnote.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THIS ACTION DOES NOT PRESENT ANY IMPORTANT ISSUE REQUIRING RESOLUTION BY THIS COURT.

The rules of this Court outline those circumstances when review on writ of certiorari is appropriate. Sup. Ct. R. 10. None of the circumstances outlined in Rule 10 is presented by the instant action. In addition to its failure to meet the requirements of Rule 10, the instant Petition should be denied for four specific reasons not explicitly stated in Rule 10, nor related to the possible merits of the case:

(1) Petitioner failed to provide any credible factual record upon which the Court could even *begin* to review the matters asserted in the Petition;

(2) Petitioner is improperly attempting to utilize the Petition to manufacture a record which was not made below. The Petitioner has attempted to place anecdotal information and informally compiled "statistics" before this Court, assertions which were not presented in either the trial court or to the Third Circuit;

(3) The Petitioner failed to raise directly applicable decisions during the proceedings below, and thus failed to create an adequate legal record below; and

(4) According to the Petitioner's statements this matter will have virtually no retroactive effect. Further this matter will have no prospective effect because of action by the Virgin Islands legislature, effective October 1, 1991, granting the Petitioner the general original jurisdiction it apparently seeks.

Petitioner lightly attempts to avoid the most obvious impediment to this Court's review of this matter – the lack of a record below. Apparently the Petitioner did not think enough of the issue at the time of trial to create an adequate record for review on certiorari, either factually or legally. The Court need not accept Respondent's view on this point as the Petition itself presents extensive argument based on new material from grounds far outside the record. The Court is entreated to consider absurd informal studies[2], anecdotal information regarding practice in the district court[3], and

---

[2] The Petitioner presents a table of statistics of a "preliminary review" of "case-load statistics." Petition for Writ of Certiorari at 17, n. 6. This information is not part of the record of this cause nor is there any indication of the reliability of the information contained.

[3] Petitioner contends that it was the District Court's "policy" to transfer actions to the Territorial Court if the amount in controversy was less than $200,000. Petitioner further asserts that "very few, if any civil cases seeking less than $200,000 were filed in the District Court." Petition for Writ of Certiorari at 16-17. These contentions are created from the whole cloth and have no basis in the sparse record created below.

numerous other factual assertions without record support.[4]

The Petitioner now attempts at the eleventh-hour to revive this issue without creating any record below. Instead Petitioner attempts to re-open the taking of evidence before this Court.

Because the matter was not thoroughly addressed below by the Petitioner, the Respondent never developed any contradictory record. Neither the trial court nor the Third Circuit were provided with the benefit of certain relevant decisions, including another decision, albeit unpublished, of the district court's St. Croix division, *Government of the Virgin Islands v. Bryan*, Criminal No. 1989-129, (D.V.I., Div. of St. Croix, January 29, 1990),

---

[4] The Petitioner makes numerous references to the unwritten policy of the district court to decline entertaining cases involving less than $200,000 and what the former judges of the District Court determined at pretrial conference. Petition for Writ of Certiorari at 16-17. Petitioner also contends that "very few cases, if any were filed in the District Court since January 1, 1977, when the $200,000-jurisdiction was vested in the Territorial Court." *Id.* at 18. Absolutely no evidence was presented in the record of this action regarding the number of cases filed in the district court at any time. Counsel for Petitioner candidly admitted to the Third Circuit, during oral argument, that numerous cases involving less than $200,000 have been filed and are still filed in the District Court. It should be noted that Petitioner misrepresents the date that the $200,000-jurisdiction limit was effective. As of January 1, 1977 the Territorial Court's upper limit was $50,000. It was not until 1981 that the limit was raised to $200,000. 1981 V.I. Sess. Laws No. 4647.

included in the Appendix to this Brief. In that action the defendant moved to dismiss on the basis that the District Court was without subject matter jurisdiction over criminal charges premised on violations of territorial law. The district court roundly denied the motion as being based on an "erroneous and spurious construction of the pertinent legislative enactments,. . . . " App. at 2. The *Bryan* court further found that it need not consider the defendant's argument regarding the 1984 amendments to the Revised Organic Act.

Perhaps the most frustrating, to Respondent, is the Petitioner's assertion that this court should consider review in this action while at the same time asserting that review will have no far-reaching effects. Petition for Writ of Certiorari at 18-19. Accepting the Petitioner's circular argument this means that the Petitioner seeks review in this court of a decision which will apply only to the instant case, *a decision which will not alter one iota the complete relief Petitioner was provided by the Third Circuit.* The situation presented by the Petitioner is the complete antithesis of "an important question of federal law which has not been, but should be, settled by this Court."

A. The decision of the Third Circuit is not in conflict with any decision of another United States court of appeals, nor does it conflict with a state or territorial court of last resort.

The Third Circuit opinion addresses the proper interpretation of certain amendments to the Revised Organic Act of 1954. These amendments deal solely with the judicial system of the territory of the Virgin Islands. The limited application of the Third Circuit's interpretation is

evident due to the fact that the United States today has very few possessions with the status of unincorporated territories. One such possession is the island of Guam. The Third Circuit's ruling in this action is fully consistent with the ruling of the Ninth Circuit when it considered a similar issue with regard to the judicial system of Guam. *Agana Bay Develop. Co. (Hong Kong) Ltd. v. Supreme Court of Guam,* 529 F. 2d 952 (9th Cir. 1976). The Third Circuit opinion in this action relies heavily upon the analysis applied by the *Agana Bay* court. Pet. App. at 12a-13a. There is no conflict among the circuits which requires resolution.

Likewise the opinion of the Third Circuit is in accord with an unpublished opinion of the district court which considered a related question of the district court's subject matter jurisdiction over criminal matters. The district court found that the restriction of the district court's jurisdiction over criminal matters was dependent upon the actions of the Virgin Islands legislature. *Government of the Virgin Islands v. Bryan,* Criminal No. 1989-129, slip op. at 7-12 (D. V. I., Div. of St. Croix, Jan. 29, 1990), App. at 1-12.

There is no split of authority which requires resolution by this Court.

B. There is no important question of federal law which should be settled by this court.

Any decision of this Court as to the merits of the question presented would have no prospective application. As of October 1, 1991, before this Court will hear

this cause, the Territorial Court will assume general original jurisdiction over all civil actions. 1990 V.I. Sess. Laws. No. 5594.

C. This Court should not grant review to a prevailing party.

The instant petition presents the unprecedented circumstance of the party who prevailed below seeking further review in this Court. The Territorial Court prevailed before the Third Circuit on an issue of territorial law, i.e. the scope of issues triable in the context of a forcible entry and detainer action. Now the Territorial Court seeks to waste this Court's time in order that its pet theory may be voiced again. Prior surveys of this Court's decisions have not revealed any instance when the Court has granted a writ of certiorari upon the petition of the party prevailing below. C. Wright, *Law of Federal Courts*, § 106 (4th ed. 1983).

The Territorial Court's petition states that it is pursuing this writ because "it will affect the autonomy and stature of the entire Virgin Islands government." Petition for Writ of Certiorari at 4. This does not provide the Territorial Court with standing to seek review in this court. The Territorial Court cannot obtain any further relief in this action beyond that which was granted by the Third Circuit.[5] The Territorial Court, at this point in this

---

[5] Likewise Estate Thomas Mall cannot obtain any relief in this Court from the decision of the Third Circuit. The decision of the Third Circuit reversing the district court rested upon an interpretation of territorial law not reviewable in this court.

action, has suffered no injury which this Court can redress. *See Public Service Commission v. Brashear Freight Lines, Inc.*, 306 U.S. 204 (1938). In effect the Territorial Court seeks an advisory opinion from this court.[6]

II. THE THIRD CIRCUIT CORRECTLY HELD THAT ACTION BY THE VIRGIN ISLANDS LEGISLATURE IS REQUIRED TO DIVEST THE DISTRICT COURT OF THE VIRGIN ISLANDS OF CONCURRENT JURISDICTION OVER LOCAL CAUSES OF ACTION

The Territorial Court contends that upon the enactment of the 1984 amendments to the Revised Organic Act of 1954 the District Court was automatically divested of its jurisdiction over local actions. The Third Circuit carefully considered this contention and found it to be incorrect. If Congress had intended such a drastic change in the jurisdiction of the district court "[s]urely Congress would have specified that the divestiture was to be immediate if that is what it intended." Pet. App. at 12a.

The Third Circuit considered the effect of the 1984 amendments to the Revised Organic Act and whether

---

[6] The sole issue in this litigation was possession of the leased premises. Pursuant to the Virgin Islands forcible entry and detainer statute, absolutely no issue other than bare possession can be decided in a forcible entry and detainer action. This is no longer an issue between the parties. On June 24, 1991 counsel for Respondent received correspondence from counsel for the Petitioner, dated June 13, 1991, that Petitioner had vacated the premises. Respondent has retaken possession of the premises. The letter from Petitioner's counsel is included in the Appendix to this brief. App. at 13-14.

they were effective *ex proprio vigore*, that is without the necessity of further action by the Virgin Islands legislature. Pet. App. at 10a-12a. The Third Circuit concluded that action by the local legislature was required to divest the district court of its concurrent jurisdiction. This conclusion is fully supported by the language of the amendments and the legislative history of those amendments.

The jurisdiction of the District Court of the Virgin Islands is defined by the statute which created it. The Organic Act of 1936 defined the jurisdiction of the district court and provided for the concurrent jurisdiction of the district court "with the inferior courts" created by local law. Ch. 699, § 25, 49 Stat. 1813 (1936). The Revised Organic Act of 1954 carried this principle forward providing for "general original jurisdiction" in the district court. Ch. 558, § 22, 68 Stat. 506 (1954). The 1954 act also provided that the Virgin Islands legislature could provide for the concurrent jurisdiction of local actions in the courts established by local law. Ch. 558, § 23, 68 Stat. 506 (1954). Both the 1936 Organic Act and the 1954 Revised Organic Act contemplated that the Virgin Islands legislature would define the jurisdiction of the local courts.

The Territorial Court contends that the 1984 amendments to the Revised Organic Act removed from the local legislature the power to define the jurisdiction of the local courts. In 1976 the Virgin Islands legislature created the Territorial Court. 1976 V.I. Sess. Laws No. 3876. This act defined the Territorial Court's exclusive jurisdiction in conformance with the provisions of the Revised Organic Act. Ch. 558, § 23, 68 Stat. 506 (1954); 1976 V.I. Sess. Laws No. 3876, § 2, p. 188, codified at 4 V.I.C. § 75. The 1984 amendments to the Revised Organic Act made no change

in the exclusive jurisdiction of the local courts. 48 U.S.C. § 1612 (b). The Virgin Islands legislature further defined the original jurisdiction of the Territorial Court as "*concurrent* with that of the district court in all civil actions wherein the matter in controversy exceeds the sum of $500 but does not exceed the sum of $50,000;. . . . " 1976 V.I. Sess. Laws No. 3876, § 2, p. 188, codified at 4 V.I.C. § 76. This limit was raised, in 1981, to $200,000. 1981 V.I. Sess. Laws No. 4647, § 1, p. 260.

The 1984 amendments to the Revised Organic Act remove the requirement of old section 23 that the general jurisdiction of the local courts must be concurrent with that of the district court. The Territorial Court wishes to take these amendments further and contends that Congress removed any discretion from the Virgin Islands legislature to provide for concurrent jurisdiction. The Territorial Court's tortured interpretation is unsupported by the language of the amendments, the legislative history of the amendments nor is it in accord with their intent. The amendments grant to the Virgin Islands legislature the absolute power to further define the jurisdiction of the local courts.

The Third Circuit correctly held that the extent of the Territorial Court's jurisdiction is a matter to be determined by the Virgin Islands legislature. Congress did not intend to unilaterally foist on the territory the burden of exclusive jurisdiction of civil actions. Instead, consistent with the prior versions of the Organic Act, Congress left this decision to the local legislature. When considering the 1984 amendments the Senate stated:

> The decision as to whether jurisdiction over strictly local causes should be vested in the district court or the local courts will be made by local law.

130 Cong. Rec. S. 10527 (August 10, 1984). The legislature has chosen to share this burden with the federal judiciary until October 1, 1991. The Territorial Court is a creation of the Virgin Islands legislature and can have no greater jurisdiction than that body provides. Petitioner's contentions otherwise are directly contrary to the Congressional intent to allow the Virgin Islands legislature the power to create and define the local courts.

CONCLUSION

Respondent Estate Thomas Mall, Inc. prays the Court to deny the Territorial Court's Petition for Writ of Certiorari.

JOHN H. BENHAM
WATTS & STREIBICH
14A Norre Gade
P. O. Box 11720
St. Thomas, Virgin Islands 00801
Tel: (809) 774-0673
Fax: (809) 776-3630

Of counsel:

CARL J. HARTMANN
201 East 28th Street
Suite 15-B
New York, N. Y. 10016
Tel: (212) 725-6327

APPENDICES

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX

GOVERNMENT OF THE VIRGIN ISLANDS, Plaintiff, vs. ADELBERT BRYAN, Defendant.	)	CRIMINAL NO. 1989-129

L. C. WRIGHT, Esq.
Special Assistant U.S. Attorney
Office of the United States Attorney
Post Office Box 3239
Christiansted, St. Croix
U.S. Virgin Islands 00822
–Attorney for Government

JEFFREY B. C. MOOREHEAD, Esq.
Law Offices of Winston Hodge
Sunny Isle Professional Building, Ste. 2
Christiansted, St. Croix
U.S. Virgin Islands 00823
–Attorney for Defendant

MEMORANDUM

RAYMOND J. BRODERICK
U.S. District Judge
Sitting by Designation

January 29, 1990

Defendant Adelbert Bryan has filed a motion to dismiss the information against him on the ground that this Court lacks jurisdiction. Defendant Bryan's claim rests on three premises. He argues first that the two offenses

which he is accused of committing – grand larceny and possession of stolen property – carry a maximum ten years' prison term each. Second, the defendant asserts that on October 1, 1987 the Virgin Islands Legislature vested in the Territorial Court authority to adjudicate every criminal action arising under local law for which the penalty is fifteen years' incarceration or less. Last, the defendant contends that given Section 22(b) of the Revised Organic Act of 1954 restricts the general original jurisdiction of the District Court to causes not vested by local law in the Territorial Court, jurisdiction over criminal actions for which the penalty does not exceed fifteen years' imprisonment resides exclusively within the Territorial Court. In consequence, the defendant argues, not only does this Court lack jurisdiction to hear the criminal proceedings against him, but also virtually every conviction and guilty plea had in the District Court of the Virgin Islands since October 1, 1987 is illegal. Because the Court concludes that the defendant's claim is predicated upon an erroneous and spurious construction of the pertinent legislative enactments, the motion to dismiss is denied.

I.

Article IV of the United States Constitution devolves upon Congress plenary power to regulate federal territories. *See Palmore v. United States*, 411 U.S. 389, 93 S.Ct. 1670 (1973); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828); *United States v. Canel*, 703 F.2d 894, 896 (3d Cir.), *cert. denied*, 464 U.S. 852, 104 S.Ct. 165 (1983). Pursuant to that authority, Congress passed the Revised Organic Act of 1954, Act of July 22, 1954, ch. 558, 68 Stat. 497, 48 U.S.C. § 1541 *et seq.*, which defines the

general contours of government in the Virgin Islands. *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 4, 75 S.Ct. 553, 555, 99 L.Ed. 773 (1955); *Virgo Corp. v. Paiewonsky*, 384 F.2d 569, 576-78 (3d Cir. 1967), *cert. denied*, 390 U.S. 1041, 88 S.Ct. 1634 (1968). In so doing, Congress established a tripartite structure, dividing power between executive, judicial, and legislative branches. *Territorial Court of the Virgin Islands v. Richards*, 673 F.Supp. 152, 157 (D.V.I. 1987), *aff'd*, 847 F.2d 108 (3d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 390 (1988); *Municipality of St. Thomas v. Gordon*, 78 F.Supp. 440, 443-44 (D.V.I. 1948).

Section 21(a) of the Revised Organic Act created the District Court of the Virgin Islands. 48 U.S.C. § 1611(a). Although the District Court of the Virgin Islands is vested with jurisdiction to entertain federal matters, it is not an article III court. *American Fidelity Fire Ins. v. Construcciones Werl, Inc.*, 1975 St. Croix Supp. 438, 469 (D.V.I. 1975). Rather, because the District Court possesses original jurisdiction over certain questions of local law, 48 U.S.C. § 1612, and serves as an appellate tribunal for decisions by the local court, 48 U.S.C. § 1613a, it is "an institution with attributes of both a federal and a territorial court." *Barnard v. Thorstenn*, ___ U.S. ___, ___, 109 S.Ct. 1294, 1298 (1989).

Section 21 of the Revised Organic Act, as amended, Act of Oct. 5, 1984, P.L. 98-454, Title VII, § 703, Title X, § 1001, 98 Stat. 1738, 1745, 48 U.S.C. § 1612, also empowered the Territorial Legislature – a unicameral body established pursuant to Section 1 of the Revised Organic Act, 48 U.S.C. § 1571 – to create local courts and

vest within them jurisdiction over "all causes in the Virgin Islands" over which the District Court does not possess exclusive jurisdiction. 48 U.S.C. § 1611(b). On May 16, 1957, the Territorial Legislature established the Municipal Court of the Virgin Islands, *see generally Homer v. Lorillard*, 6 V.I. 558, 567-69 (Mun. Ct. 1967), which was later redesignated as the Territorial Court. Act of Sept. 9, 1976, No. 3876, § 5, 1976 Sess. L. 197, 4 V.I.C. § 2. It is the scope of that Court's criminal jurisdiction that forms the basis of the present controversy.

II.

A.

In 1976, the Virgin Islands Legislature passed Act 3876, which bestowed upon the Territorial Court original jurisdiction, concurrent with that of the District Court, over "all criminal actions wherein the maximum sentence exceeds a fine of $100 or imprisonment for six months but does not exceed imprisonment for one year or a fine as prescribed by law." The Legislature further mandated that two years after the Act's effective date the Territorial Court would assume original jurisdiction, concurrent with the District Court's, "in all criminal actions wherein the maximum sentence does not exceed imprisonment for five years or a fine as prescribed by law." Act of Sept. 9, 1976, No. 3876, § 2(b), 1976 Sess. L. 189. The measure was codified at 4 V.I.C. Section 76(b) and remained unaltered until 1984.

On December 20, 1984, the Fifteenth Virgin Islands Legislature passed Act 5040. Act 5040, Section 3 stated in full:

(a) Title 4, Section 76, subsection (b) Virgin Islands Code is amended as follows:

"(b) The Territorial court shall have original jurisdiction, concurrent with that of the district court, in all criminal actions wherein the maximum sentence does not exceed imprisonment for 15 years or a fine as prescribed by law."

(b)(1) One year after the effective date of this Act, the Territorial Court shall have original jurisdiction, concurrent with that of the District Court in all criminal actions unless within the year the Presiding Judge of the Territorial Court, after making an assessment of the case load under the jurisdiction in subsection (a) of this Section, determines that the increase of its jurisdiction would be burdensome to the court.

(2) The Presiding Judge of the Territorial Court shall report the results of the assessment mandated by paragraph (1) of this subsection to the Legislature not later than January 31, 1986.

(c) This Section shall become effective March 1, 1985.

Act of Feb. 1, 1985, No. 5040, § 3, 1984 Sess. L. 464. The Governor approved the item on February 1, 1985.

On February 28, 1985, the Sixteenth Legislature passed Act 5045, denominated by that body as a measure to "delay the effective date . . of Section 3 of Act 5040, which expands the jurisdiction of the Territorial Court." Act of Mar. 1, 1985, No. 5045, 1985 Sess. L. 3. Section 1 of Act 5045 amended Section 3 of Act 5040, although the former did nothing to disturb the substance of the two-tiered expansion of territorial jurisdiction over local criminal matters. As amended by Act 5045, Act 5040, Section

3, subsection (a) still vested in the Territorial Court "original jurisdiction in all criminal actions wherein the maximum sentence does not exceed imprisonment for 15 years or a fine as prescribed by law." Similarly, Act 5040, Section 3, subsection (b), paragraphs (1) and (2), as amended by Act 5045, still provided that one year after the effective date of Section 3, the Territorial Court would possess authority to adjudicate "all criminal actions," regardless of penalty, and that the Presiding Judge would report to the Legislature on or before a date certain. Act 5045 did, however, postpone the effective date of Act 5040, Section 3 by amending subsection (c) to read "October 1, 1987," instead of "March 1, 1985." Act 5045 was approved by the Governor on March 1, 1985.

At the "insistence" of the Territorial Court, *Government of the Virgin Islands v. James*, 23 V.I. 205, 216 (D.V.I. 1987) (Christian, J., concurring in part, dissenting in part), the Legislature promulgated Section 107 of Act 5206 in order to delay even further the effective date of Act 5040, Section 3. Passed on September 29, 1986, Act 5206 provided:

> SECTION 107. Act 5040, Section 3, subsections (b) and (c), as amended by Act 5045, Section 1, are amended to read as follows:
>
> "(b)(1) One year after the effective date of this Section, subject to the concurrent jurisdiction conferred on the District Court of the Virgin Islands by Sections 21 and 22 of the Revised Organic Act of the Virgin Islands, as amended, the Territorial Court shall have original jurisdiction in all criminal actions.
>
> (2) The Presiding Judge of the Territorial Court shall assess the case load which the Court

> will assume after the increase in its jurisdiction pursuant to this Act. The Presiding Judge shall report the results of the assessment to the Legislature not later than January 31, 1991.
>
> (c) This Section shall become effective October 1, 1990."

Act of Oct. 14, 1986, No. 5206, § 107, 1986 Sess. L. 236.

B.

In interpreting a legislative pronouncement, this Court must begin with its plain language and need not review the legislative history if it is unambiguous on its face. *TVA v. Hill*, 437 U.S. 153, 184 n.29, 98 S.Ct. 2279 (1978); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201, 96 S.Ct. 1375 (1976); *Barnes v. Cohen*, 749 F.2d 1009, 1013 (3d Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S.Ct. 2126 (1985). The cumulative meaning of Acts 5040, 5045, and 5206 could not be more clear. As amended by Acts 5045 and 5206, Section 3 of Act 5040, by revising 4 V.I.C. Section 76(b), evinces an obvious intent to deposit expanded criminal jurisdiction in the territory's local court. Section 3 establishes a two-phase process by which the Territorial Court's authority to hear criminal cases will be broadened. First, subsection (a) of Section 3 declares that commencing on the Section's effective date the Territorial Court will assume original jurisdiction over criminal offenses carrying a maximum sentence not exceeding fifteen years' imprisonment. Second, subsection (b), paragraphs (1) and (2), state that one year after the Section's effective date the Territorial Court's original jurisdiction will further expand to embrace all criminal actions, irrespective of penalty, and that the Presiding Judge shall

render an administrative assessment of the legislation's impact. Subsection (c) states when Section 3 of Act 5040 shall become effective. Thus properly construed, amended Act 5040 provides that on October 1, 1990 the Territorial Court will have original jurisdiction over criminal actions in which the maximum sentence does not exceed imprisonment for fifteen years[1] and that on October 1, 1991 the Territorial Court will have original jurisdiction over all criminal actions.

The defendant's misinterpretation of these enactments is the result of two elementary errors. First, he contends that Act 5206 did not delay the expansion of territorial jurisdiction over crimes punishable up to fifteen years' imprisonment "since the legislature deliberately excluded any reference to subsection (b)" of Act 5040, Section 3, and amended only "the subsequent subparagraphs (b)(1) and (b)(2)." Defendant's Memorandum of Law, at 3. Section 3 of Act 5040, however, does not even contain a subsection (b) as such. Subsection (b) of Section 3 is immediately cleaved into two paragraphs, (1) and (2), without any matter attached to a subsection independently denominated as subsection (b). The "subsection (b)" upon which the defendant relies is not a subsection of Section 3 at all, but rather a reference to subsection (b) of 4 V.I.C. § 76 that is contained within *subsection (a)* of Act 5040, Section 3.

---

[1] The Court therefore approves Equity Publishing Company's annotation to 4 V.I.C. § 76(b), which states that the Territorial Court's fifteen year jurisdiction will begin on October 1, 1990.

Second, to reach his conclusion, the defendant, in essence, interprets subsection (c) to govern the effective date of only subsection (b), paragraph (1), but not the effective date of subsection (a). This reading is irrational and runs directly counter to the plain language of the Acts. Subsection (c), in each of its versions, delineates the effective date of the "Section." As amended by Act 5206, subsection (c) of Act 5040, Section 3, unreservedly states: "This Section shall become effective October 1, 1990." The Section to which it refers, of course, is Section 3, of which subsections (a) and (b)(1)-(2) are coordinate components. *See* Act 5040, § 3(b)(1) (referring to "subsection (a) of this Section"); Act 5040, § 3(b)(2) (referring to "paragraph 1 of this subsection); Act 5045, § 1 (referring to "Section 3 of Act 5040"); Act 5206, § 107 (referring to "Act 5040, Section 3, subsections (b) and (c)"). Subsection (c) simply contains no terms restricting its operation to subsection (b), paragraph (1). Indeed, subsection (b), paragraph (1) itself, as amended by Act 5206, refers to the "effective date of this Section," not of "this subsection" or "this paragraph." Moreover, the defendant's interpretation is internally inconsistent, for he agrees, as he must, that the amendment to subsection (c) introduced by Act 5045 did in fact postpone the effective date of Act 5040, Section 3, subsection (a), but denies that a virtually identical change to subsection (c) proclaimed by Act 5206 did not delay the effective date of Act 5040, Section 3, subsection (a).

C.

Precedent also compels today's disposition.[2] In *Government of the Virgin Islands v. James*, 23 V.I. 205 (D.V.I. 1987), a case which the Defendant failed to cite either in his brief or at argument, a three-judge territorial appellate panel considered the effect that this series of legislation had upon the criminal jurisdiction of the Territorial Court. Construing the precise enactments at issue here, Presiding Judge Christian wrote:

> It is knowledge so common as not to require statutory reference, that in former times the Territorial Court (then the Municipal Court) could not impose a sentence in excess of one year. Later on that authority of the Territorial Court was increased to the imposition of a sentence of not more than five years. Recently the Legislature of the Virgin Islands, recognizing that the sentencing limits of the judges of the Territorial Court of the Virgin Islands was a maximum of five years, undertook by Act No. 5040, approved February 1, 1985, to increase the sentencing authority of that court to a maximum of fifteen years. However, for reasons not here pertinent, the Legislature deferred the effective date of

---

[2] Further, the 1989 *Bluebook*, an official publication of the Virgin Islands which describes the structure of the local government, explicitly states that the territorial court possesses "original and exclusive jurisdiction" over "all criminal cases in which the maximum punishment that may be imposed does not exceed a fine of $100 or imprisonment of six months, or both" and that the territorial court also possesses "original and concurrent jurisdiction with the District Court . . . over criminal cases in which the maximum sentence does not exceed imprisonment for five years or a fine as prescribed by law." United States Virgin Islands Bluebook 37 (3d ed. 1989).

> that enactment to October 1, 1988, by Act No. 5045, approved March 1, 1985, and at the insistence of the very territorial Court postponed the effective date further, to January 31, 1991, by Act No. 5206 duly passed by the Legislature on September 29, 1986, and permitted to become law without executive approval as of October 14, 1986.

Id. at 216 (Christian, J., concurring in part, dissenting in part).

The *James* majority essentially was of the same view. The court initially noted that "[t]he territorial court has concurrent jurisdiction with the district court in all criminal actions wherein the maximum sentence does not exceed imprisonment for five years." *Id.* at 207. The Court then stated that although Act 5040 had deposited in the Territorial Court jurisdiction over criminal offenses for which the maximum sentence did not exceed fifteen years, Act 5206 had extended "the effective date of this provision" to October 1, 1991. *Id.* at 207 n.1. Although this Court disagrees with the *James* panel insofar as it identified the effective date of amended Act 5040, Section 3, subsection (a) as either January 31, 1991 or October 1, 1991, it is manifest that all three members of the panel, including one territorial judge, understood Act 5206 to delay the expansion of the Territorial Court's jurisdiction over not only all crimes, but also fifteen year crimes.

III.

In view of today's disposition, the Court need not evaluate the thesis that the Revised Organic Act as amended in 1984, Act of October 5, 1984, P.L. 98-454, Title

VII, § 703, Title X, § 1001, 98 Stat. 1738, 1745, 48 U.S.C. § 1612, renders the respective general original jurisdictions of this Court and the Territorial Court mutually exclusive. The Court does note, however, that the defendant's assertion is contrary to established precedent construing the Revised Organic Act prior to 1984. The Third Circuit repeatedly stated before the enactment of P.L. 98-454 that the Revised Organic Act did not permit the actions of the Territorial Legislature to limit the District Court's jurisdiction. *Carty v. Beech Aircraft Corp.*, 679 F.2d 1051, 1057 n.7 (3d Cir. 1982); *Excavation Const. Inc. v. Quinn*, 673 F.2d 78, 80-81 (3d Cir. 1982); *Pan American World Airways v. Government of the Virgin Islands*, 459 F.2d 387, 391 (3d Cir. 1972); *cf. Thorstenn*, 109 S.Ct. at 1298 (dictum); *see In re Alison*, 837 F.2d 619, 622 (3d Cir. 1988) (stating "overall congressional intention discernible" in title VII of P.L. 98-454 is greater territorial autonomy over local appellate structure). The defendant does not even mention this line of caselaw, let alone discuss its continued vitality. Because the Court has concluded Act 5206 defers until October 1, 1990 the expansion of Territorial Court jurisdiction over criminal actions wherein the maximum penalty is fifteen years' incarceration, the Court need not address the question whether under the amended Revised Organic Act the Legislature's enlargement of general original jurisdiction in the Territorial Court, when it takes effect, will divest this Court of the original concurrent jurisdiction over matters of local law that it currently possesses.

An appropriate order follows.

TERRITORIAL COURT OF THE VIRGIN ISLANDS
[SEAL]
774-6680

OFFICE OF
GENERAL COUNSEL

P.O. BOX 70
CHARLOTTE AMALIE,
ST. THOMAS
VIRGIN ISLANDS 00801-0070

June 13, 1991

John H. Benham, III, Esq.
14A Norre Gade
P.O. Box 11720
St. Thomas, Virgin Islands 00801

Re: Premises located at 2-6B Vitraco Park

Dear Atty. Benham:

With reference to your letter of the 10th instant as you are well aware, shortly after it became the landlord, your client undertook to constructively evict the Court from the subject premises. This eviction was evidenced by, among other things, the repeated refusal to supply the premises with useable water despite your client's obligation to do so. This conduct on the part of your client became so egregious that we were left with no choice but to completely vacate the premises in May 1991.

The fact of our constructive eviction has been heretofore communicated to both you and your client both

orally and in writing, a fact with which you are well aware.

Sincerely,

/s/ Leon A. Kendall
LEON A. KENDALL
General Counsel

LAK/ham

cc: Presiding Judge Hodge
Mrs. Viola Smith

REPLY BRIEF

Supreme Court, U.S.
FILED
JUL 17 1991
OFFICE OF THE CLERK

(3)

No. 90-1564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Petitioner,

v.

ESTATE THOMAS MALL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY BRIEF

LEON A. KENDALL *
General Counsel
TERRITORIAL COURT OF THE VIRGIN ISLANDS
Barbel Plaza
Post Office Box 70
St. Thomas, V.I. 00801
(809) 774-6680
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	ii
CLARIFICATION OF STATUTES INVOLVED	1
CLARIFICATION OF STATEMENT OF THE CASE	2
CLARIFICATION OF SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THIS ACTION PRESENTS AN IMPORTANT ISSUE INVOLVING THE POWER OF THIS COURT TO SUPERVISE THE THIRD CIRCUIT COURT OF APPEALS	3
A. The Decision of the Third Circuit Is in Conflict With the Decisions of This Court and Time-Honored Rules of Statutory Construction, Thereby Requiring the Exercise of the Court's Supervisory Powers	7
B. Whether a Federal Court Should Continue to Exercise Subject Matter Jurisdiction Where None Exists Is Always an Important Question of Federal Law	7
C. Petitioner Was Not the Prevailing Party With Respect to the Important Issue of the District Court's Subject Matter Jurisdiction	8
II. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT THE DISTRICT COURT WAS NOT DIVESTED, *EX PROPRIO VIGORE*, OF CONCURRENT JURISDICTION OVER FORCIBLE ENTRY AND DETAINER (F.E.D.) ACTIONS UPON THE EFFECTIVE DATE OF P.L. 98-454	8
A. The Matter Is Not Moot	9
CONCLUSION	10
APPENDIX	1a

TABLE OF AUTHORITIES

Cases: Page

Agana Bay Development Co. Ltd. v. Supreme Court of Guam, 529 F.2d 952 (9th Cir. 1976) 3

Government of the Virgin Islands v. Bryan, Criminal No. 1989-129, slip opinion (D.V.I., St. Croix, Jan. 29, 1990) 6

Statutes and Regulations:

United States Code:

48 U.S.C. § 1612(b) 4, 5

Virgin Islands Code:

Title 4, Section 32 .... 1, 2

Title 28, Section 782(b) 2, 6, 8, 9

Legislative Materials:

P.L. 98-454 .... 1, 2, 6, 8, 9

Revised Organic Act of 1954, as amended, Section 22 .... 1, 2

United States Supreme Court Rules:

Rule 10.1(a) 2, 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1564

TERRITORIAL COURT OF THE VIRGIN ISLANDS,
Petitioner,

v.

ESTATE THOMAS MALL, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY BRIEF

CLARIFICATION OF STATUTES INVOLVED

In an attempt to mislead the Court, Respondent cites statutes which are both obsolete and irrelevant. Specifically, Section 22 of The Revised Organic Act referred to in 4 V.I.C. § 32 as cited by Respondent, was substantially amended by P.L. 98-454 to remove the provision dealing with the District Court's authority to transfer cases from the local court. Accordingly, a review of Section 22 of The Revised Organic Act as amended by P.L. 98-454 reveals no such authority. Additionally, as revised by P.L. 98-454, the District Court's original jurisdiction

no longer extends to "all other causes in the V.I. exclusive jurisdiction over which is not conferred by this act upon the inferior courts of the Virgin Islands." This language was removed from Section 22 by Congress with the enactment of P.L. 98-454, with the result that such authority is no longer vested in the District Court. Thus, the continued viability of 4 V.I.C. § 32 which was enacted prior to P.L. 98-454 is highly questionable at best.

CLARIFICATION OF STATEMENT OF THE CASE

Respondent's statement that the Petitioner is "attempting to obtain through litigation what a co-equal branch of the Virgin Islands Government . . . has refused to grant by legislation i.e. exclusive jurisdiction of local causes of action" is false. It is false because the V.I. Legislature has since 1957 granted the local court exclusive and original jurisdiction over F.E.D. actions. 28 V.I.C. § 782(b). It is also false because a review of the petition and the record below clearly reveals that this case is not about the grant to the local Court of exclusive jurisdiction over local causes of action, but, rather, the federal judiciary's refusal to accept the local Court's exclusive jurisdiction over F.E.D. actions, contrary to the express mandate of Congress.

CLARIFICATION OF SUMMARY OF ARGUMENT

Contrary to Respondent's contention, the only portion of the Third Circuit's decision with which Petitioner is dissatisfied is its disposition of the threshold and fundamental issue presented i.e. the District Court's lack of subject matter jurisdiction over F.E.D. actions. Additionally, contrary to Respondent's contention which is once again false and misleading, this action presents a clearly recognized ground justifying the Court's exercise of its discretion to hear the merits of this case, viz, the need, pursuant to Rule 10.1(a) of this Court to supervise the

Third Circuit in order to ensure that it conforms to the mandate of Congress divesting the District Court of concurrent jurisdiction over local F.E.D. actions. Furthermore, the decision relied upon by the Third Circuit i.e. *Agana Bay Development Co. v. Supreme Court of Guam*, 529 F.2d 952 (9th Cir. 1976) is clearly distinguishable from the case at bar, thus it cannot be deemed to be in harmony with the case at bar.

Finally, contrary to Respondent's contention, the matter is of great concern to the people of The Virgin Islands because if this Court does not intervene to restrain the District Court from continuing to exercise jurisdiction where none exists, it would only result in compounding the miscarriage of justice caused by such an illegal exercise of jurisdiction.

ARGUMENT

I. THIS ACTION PRESENTS AN IMPORTANT ISSUE INVOLVING THE POWER OF THE SUPREME COURT TO SUPERVISE THE THIRD CIRCUIT COURT OF APPEALS.

In an opposition noteworthy for its *ad hominem* argumentation, Respondent has failed to address the threshold issue presented by the petition for Writ of Certiorari. Simply stated, the issue is whether the Court should exercise its supervisory power over the Third Circuit to prevent the continued exercise of federal jurisdiction over purely local Forcible Entry and Detainer (F.E.D.) actions contrary to the express intent of Congress. By framing the issue as not presenting a conflict with any decision of another U.S. Court of Appeals or state or territorial court, Respondent is in effect attempting to mislead the Court into believing that a conflict with other circuits is the only basis for granting the Writ. In fact, there are several other bases set forth in Rule 10.1 of this Court, including the one relied upon by Petitioner which contemplates issuance of the Writ as follows:

> (a) When a United States Court of Appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's Power of Supervision.

A review of the petition clearly reveals that the U.S. Court of Appeals for the Third Circuit has not only violated this Court's decisions and time-honored rules regarding statutory construction but it has sanctioned the District Court's improper exercise of federal jurisdiction based upon an erroneous construction of 48 U.S.C. § 1612(b). Such conduct by the Third Circuit should not escape this Court's exercise of its supervisory powers in order to ensure the proper exercise of federal jurisdiction. Clearly, the petition makes a compelling case for this Court's intervention in order to prevent the continuing miscarriage of justice that would result in the Virgin Islands if the decision of the Third Circuit is permitted to stand. Accordingly, Respondent's four reasons for denying the petition must be rejected as follows:

(1) Because the issue presented is legal, involving as it does the District Court's jurisdiction over purely local F.E.D. actions, the establishment of a factual record is not dispositive of this petition except that the Third Circuit assumed certain facts not in the record as the basis for its decision which Petitioner was forced to refute. Indeed, Respondent cannot be heard to now complain about the lack of a factual record when it was Respondent who was totally responsible for this situation. Specifically, the instant action was a *summary* proceeding brought by Respondent because of what it perceived to be the slow pace of a previously filed civil action against Petitioner seeking the identical relief sought in the case at bar. Because of the summary nature of the action, exactly twenty-eight (28) days elapsed from the time of filing to the hearing on the merits. See Pet. App., page 18a. It is thus clear that Respondent's attempt to blame Petitioner for the lack of a factual or legal record is at

best inartful. At worst, it is but yet another attempt to mislead the Court. In any event, the facts surrounding this case were amply established and set forth in the District Court's and Third Circuit's decisions which are contained in the Appendix to the petition. Accordingly, no credence can be given to the false statement of Respondent that the petition lacks a factual record for consideration by the Court.

(2) Similarly false and misleading is Respondent's statement that Petitioner is attempting to "manufacture a record which was not made below." A review of the record below clearly reveals that in its Petition for Rehearing which was timely and properly served upon Respondent, see attached Appendix, Petitioner challenged the Third Circuit's reliance on non-existent facts in concluding that "hundreds or even thousands of civil actions that the District Court has processed in the last six years" would be thrown into confusion if it accepted Petitioner's construction of 48 U.S.C. § 1612(b). The statistics offered by Petitioner to refute this erroneous finding by the Third Circuit which has no basis in the record were not "manufactured" by Petitioner but were provided by the Chief Deputy Clerk of the District Court, a fact well known to Respondent which it seeks to challenge by resorting to cynicism rather than contrary empirical evidence.

(3) Equally meritless is Respondent's contention that Petitioner has failed to raise directly applicable decisions during the proceedings below, thereby failing to create an adequate legal record. In fact, Petitioner has repeatedly contended that this case presents an issue of first impression in the Virgin Islands, hence the lack of any reference to cases on point from other circuits. Accordingly, once again, no credence can be given to Respondent's false statement to the contrary.

(4) Contrary to Respondent's contention, the continued exercise by the District Court of jurisdiction over F.E.D.

and other purely local actions will have a devastating prospective effect on litigants in the Virgin Islands. By exercising jurisdiction where none exists, the District Court will be acting contrary to law while denying to litigants the proper forum to have their cases and controversies adjudicated as intended by Congress when it granted increased local autonomy to the local government. Moreover, any prospective expanded jurisdiction to be granted to the local court by the local Legislature would provide no increase in jurisdiction with respect to F.E.D. actions since the local Court is already vested with such jurisdiction pursuant to 28 V.I.C. § 782(b). Accordingly, the District Court should not be permitted to continue to exercise jurisdiction over such cases where, as here, Congress has specifically divested it of such jurisdiction.

The case of *Government of the Virgin Islands v. Bryan* relied upon by Respondent is totally irrelevant to the instant case. In the first place, *Bryan* is a criminal case. Secondly, the case involved the determination of a local statute expanding the local Court's criminal jurisdiction. In the case at bar, however, such enabling legislation was totally unnecessary because the local legislature had, prior to the enactment of P.L. 98-454, vested original jurisdiction over all F.E.D. actions in the local Court. Moreover, given Respondent's admission that *Bryan* did not deal with the interpretation of the 1984 amendments to the Revised Organic Act (P.L. 98-454), that case is irrelevant since the case at bar centers around an interpretation of the amendments in question. Accordingly, Respondent's reliance on an unpublished opinion of a case that is totally inapposite to the case at bar must be rejected.

A. The Decision of the Third Circuit Is in Conflict With the Decisions of This Court and Time-Honored Rules of Statutory Construction, Thereby Requiring the Exercise of the Court's Supervisory Power.

A review of the petition clearly reveals the gross departure by the Third Circuit from the decisions of this Court and time-honored rules regarding statutory construction. This departure was compounded by the Third Circuit's reliance on non-existent facts, speculation and surmise to reach a decision that was obviously result-oriented rather than based on sound legal reasoning. It is respectfully submitted that because of this remarkable departure from accepted judicial precedent, the invocation of this Court's supervisory power over the Third Circuit is in order.

Respondent's focus on the lack of a conflict with any decision of another circuit is myopic. Specifically, it conveniently ignores the fact that such conflict is not the only reason set forth in Rule 10.1(a) for the exercise of this Court's jurisdiction. It is our contention that a conflict with the decisions of this Court and time-honored rules of statutory construction merits consideration by this Court, as provided in that same Rule. The narrow interpretation of the rule by Respondent must be rejected. The Third Circuit has so far departed from the accepted and usual course of judicial procedure and sanctioned such a departure by the District Court of the Virgin Islands that this Court should grant Certiorari to exercise its supervisory power over the Third Circuit.

B. Whether a Federal Court Should Continue to Exercise Subject Matter Jurisdiction Where None Exists Is Always an Important Question of Federal Law.

Respondent's contention that any decision by this Court will have no prospective effect is false. As noted heretofore, if the decision of the Third Circuit is permitted to stand, the District Court will continue to exercise jurisdiction which has been divested by Congress in its enact-

ment of P.L. 98-454. Whether this Court should sanction the continued exercise of such jurisdiction is a very important question of federal law. Moreover, this Court cannot rely on a prospective vesting of jurisdiction as a basis for declining to presently exercise its supervisory power over the Third Circuit, especially where, as here, consideration is being given to postponing the effective date of such jurisdiction. In any event, as noted heretofore, the prospective jurisdiction in question is irrelevant to the case at bar. Accordingly, Respondent's contention must be rejected.

C. Petitioner Was Not the Prevailing Party With Respect to the Important Issue of the District Court's Subject Matter Jurisdiction.

Petitioner has pursued this litigation because of the Third Circuit's disregard for Congressional policy granting increased judicial autonomy to the people of the Virgin Islands. Unless this Court exercises its supervisory power to correct this usurpation of Congress' mandate, the result would in all probability be not only the continued illegal exercise of jurisdiction over F.E.D. actions by the District Court, but this illegality would continue indefinitely into the future.

II. THE THIRD CIRCUIT ERRED IN CONCLUDING THAT THE DISTRICT COURT WAS NOT DIVESTED, *EX PROPRIO VIGORE*, OF CONCURRENT JURISDICTION OVER F.E.D. ACTIONS UPON THE EFFECTIVE DATE OF P.L. 98-454.

Petitioner has already set forth cogent authority showing that upon the effective date of P.L. 98-454, the District Court was divested of concurrent jurisdiction over F.E.D. actions since at that time original jurisdiction over such actions was "then vested" in the local Court pursuant to 28 V.I.C. § 782(b). Accordingly, upon the effective date of the Act (i.e. 90 days after its enactment on October 5, 1984, or, or on about January 5, 1985), the

District Court's concurrent jurisdiction over F.E.D. actions set forth in 28 V.I.C. § 782(b) ceased. With the enactment of P.L. 98-454, therefore, the District Court was divested, *ex proprio vigore*, of concurrent jurisdiction over F.E.D. act ons. Moreover, since the local Court was "then vested" with original jurisdiction over F.E.D. actions prior to the enactment of PL 98-454, there could be no need for the local Legislature to re-enact a law vesting the identical original jurisdiction over FE.D. actions in the local Court. Such an enactment would be a redundancy.

Except for restating the erroneous analysis of the 3rd Circuit, Respondent has added nothing to refute Petitioner's contention that the District Court was divested, *ex proprio vigore*, of concurrent jurisdiction over F.E.D. actions upon effective date of P.L. 98-454.

A. The Matter Is Not Moot.

In another obvious attempt to mislead this Court, Respondent suggests that the case is moot because it constructively evicted Petitioner from the premises. This fact, however, is irrelevant to the District Court's prior and continuing improper exercise of jurisdiction over F.E.D. actions. If this Court declines to exercise its supervisory power over the Third Circuit, the result would be precisely that noted heretofore i.e. the District Court's usurpation of the local judiciary's autonomy to hear and decide local F.E.D. actions as mandated by Congress. Thus, the illegal exercise of subject matter jurisdiction would not be moot, but would be alive and well and only this Court can stop this illegality by granting the Petition for Certiorari.

CONCLUSION

Based upon the foregoing, Petitioner prays that the Court should exercise its supervisory power and preserve the judicial autonomy of the Virgin Islands by granting the Petition for Writ of Certiorari.

Respectfully submitted,

LEON A. KENDALL *
General Counsel
TERRITORIAL COURT OF THE
VIRGIN ISLANDS
Barbel Plaza
Post Office Box 70
St. Thomas, V.I. 00801
(809) 774-6680
Counsel for Petitioner

Date: July 17, 1991

* Counsel of Record

APPENDIX

VI

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee/cross-appellant's Petition for Rehearing was hand-delivered to John H. Benham, III, Esquire, Counsel for Appellant/cross-appellee, Estate Thomas Mall, Inc., c/o Watts and Streibich, 14A Norre Gade, St. Thomas, United States Virgin Islands, this 30th day of January, 1991.

/s/ M. Grant